HEWITSONS LLP – SUBMISSIONS TO THE CIVIL JUSTICE COUNCIL

The thoughts contained in this position paper, are those of Hewitsons LLP. Hewitsons has offices in Cambridge, Northampton, Milton Keynes and London. It undertakes a wide variety of disputes ranging from disputes as between shareholders and partners, professional negligence, property litigation and contentious probate matters. We routinely deal with cases subject to costs budgeting measures. Our submissions to the Civil Justice Council are as follows:

1. The underlying position of this firm, is that it is essential for the Courts to take an active role in case management. Non-compliance with Court orders and the Civil Procedure Rules must be the exception and not the rule. To that end, a stricter approach to case management alongside the costs budgeting measures is to be welcomed.

2. That said, it is felt that the hard-line approach taken by the Court of Appeal in the post-Jackson era risks encouraging an increase in satellite litigation. There is a risk that, every decision granting relief from sanctions or excusing default (no matter how trivial), will be viewed by solicitors as being appealable. This is undoubtedly due to the uncertainty as to when a Court will entertain default, and when it will not. This necessarily encourages an increase in applications for extensions of time and/or relief from sanctions prior to the default. Contrary to what was intended by the Jackson Reforms, this serves to increase costs for litigants, and also puts an additional strain on Court time.

3. It is submitted, that it would be useful to have further guidance on the circumstances of when a breach of the Civil Procedure Rules or a Court Order will be "trivial" in accordance with the decision in *Mitchell v News Group Newspapers*, [2013] EWCA Civ 1537. Whilst it is doubtful that a party will ever intentionally put itself in breach of it's obligations, it is a matter of fact that breaches will occur. There needs to be certainty as to how these breaches will be dealt with. In the absence of such guidance, the circumstances in which a party will be able to obtain relief from sanctions are uncertain. The case law in this area is, at times, contradictory. It would therefore be helpful to receive clarification from the Court of Appeal at the earliest available opportunity, as to which, if any, of the decisions relating to relief from sanctions have been wrongly decided.

4. By way of an example of the predicament faced by practitioners, one can compare the decision in *Summit Navigation Limited and others v Generali Romana Asigurare Reasigurare SA and another*, [2014] EWHC 398 (Comm), with the decision of the Court in *Associated Electrical Industries Limited v Alstom UK*, Case No: 2013 Folio 751. In the former case, the Claimant failed to comply with an order to give Security for Costs. The delay, was the fault of the underwriters of the bond, and was not attributable to the solicitors in question or their client. The bond was ready to be delivered the day after it was required by the Order. In that instance, the Defendant's solicitor refused to accept the bond. They also refused to agree to lift the automatic stay imposed by the Claimant's failure to comply with the deadline. The Defendant's cited *Mitchell*, and maintained that the Claimant's non-compliance with the Order left the matter stayed *Ad Infinitum*. The Court disagreed, and punished the Defendant in

costs for attempting to use the Jackson reforms and the *Mitchell* decision to their tactical advantage.

5. In the *Alstom* case, the Court made it clear that the Claimant's failure to serve Particulars of Claim within the deadline did not prejudice the Defendant. The Court went as far to say that it would be disproportionate for it to strike out the Claim Form. Despite this, the Court still ordered the Claim Form to be struck out. Decisions such as *Alstom* have sent out a message to the solicitor's profession that compliance with deadlines will take precedence over proportionality. Despite the decision in *Summit Navigation*, it naturally follows that solicitors will attempt to use this perceived approach for a tactical advantage. Arguably, solicitors owe a duty to their client to do so. This will only serve to increase costs, and further strain Court resources.

6. Whilst it is important to take a stricter approach to case management, it is submitted that this should be coupled with a reform of Court processes to improve lines of communication between the solicitor's profession and the Courts. An example of this, is the aforementioned case of *Alstom UK*. In that case, the Defendant filed an Acknowledgment of Service on 1 October 2013. It was only when the Claimant's Solicitor chased the Commercial Court on 8 October 2013, they were informed that the Acknowledgment had been so filed. The reason given was that the "Commercial Court was very busy". It is noteworthy that the reasoning of the Commercial Court, was essentially the argument put forward by the Claimant's solicitors in *Mitchell*, to excuse their non-compliance with CPR 3.13. It is, as the Commercial Court acknowledged in *Alstom UK*, a source of frustration for solicitors that financial and time pressures on solicitors represent unacceptable excuses for delay, when they remain very much a viable excuse for the Courts.

7. Added to this frustration for matters being heard in the County Court, is that County Court desks appear largely to only be open between 10am and 2pm. Whilst the assistance of the Court staff remains greatly appreciated, these limited opening hours undoubtedly restrict a solicitor's ability to issue out of the County Court. It is also a source of frustration in the profession that one is often unable to reach the County Court staff by telephone, and is instead forced to telephone a centralised service. Although it is appreciated that the Court staff will assist with urgent matters outside of the opening hours, the restricted access to the Court is frustrating, especially in light of the greater need for collusion between solicitors and the Court in light of the strict interpretation of the Jackson reforms.

8. If we can be of any further assistance, please do not hesitate to contact our Stewart Morrison on 01223 532702 or stewart.morrison@hewitsons.com.